86 - 1308

Supreme Court, U.S.
FILED
FEB 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FARIED BAIANI,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI

CLINARD J. HANBY
HAYNES & FULLENWEIDER
A Professional Legal Corporation
4300 Scotland
P. O. Box 701068
Houston, Texas 77270-1068

Attorneys for Petitioner

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

QUESTION PRESENTED FOR REVIEW

What corroborating circumstances are required of the out-of-court statements against the penal interest of a third party when such statements by that third party are offered in evidence to exculpate the accused in a criminal case?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	III
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE	2
STATEMENT OF FACTS	3
REASONS WHY WRIT SHOULD BE GRANTED	8
ERRONEOUS INTERPRETATION OF FEDERAL RULE OF EVIDENCE 804(b)(3) BY THE COURTS BELOW	8
CONCLUSION AND PRAYER	25
CERTIFICATE OF SERVICE	26
APPENDICES:	
A. OPINION OF THE COURT OF APPEALS	1a
B. RULING OF THE DISTRICT COURT	4a
C. JUDGMENT OF THE COURT OF APPEALS	14a
D. ORDER OF THE COURT OF APPEALS OVERRULING MOTIONS FOR REHEARING	15a

TABLE OF AUTHORITIES

Page

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Amend. V 2
United States Constitution, Amend. VI 2
United States Constitution, Amend. XIV 2
Federal Rule of Evidence 804(b)(3) ..... *passim*
Federal Rule of Evidence 805(b)(5) 18

CASES

Page

Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973) 10, 20, 21, 22
Cool v. United States, 409 U.S. 100, 93 S. Ct. 354, 34 L.Ed.2d 335 (1972) 16
Donnelly v. United States, 228 U.S. 243, 33 S. Ct. 449, 57 L.Ed. 820 (1913) 14
Leary v. United States, 395 U.S. 6, 89 S. Ct. 1532, 23 L.Ed.2d 57 (1969) 19
Lego v. Twomey, 404 U.S. 477, 92 S. Ct. 619, 30 L.Ed.2d 618 (1972) 16, 17
Lowery v. Maryland, 401 F. Supp. 604 (D. Md. 1975), *aff'd without opinion*, 532 F.2d 750 (4th Cir.), *cert. denied*, 429 U.S. 919 (1976) 20
Manson v. Braithwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L.Ed.2d 140 (1977) 16
Opper v. United States, 348 U.S. 84, 75 S. Ct. 158, 99 L.Ed. 101 (1954) 16
Parker v. Randolf, 442 U.S. 62, 99 S. Ct. 2132, 60 L.Ed. 2d 713 (1979) 16
People v. Edwards, 396 Mich. 551, 242 N.W.2d 739 (1976) 22
United States v. Atkins, 558 F.2d 133 (3rd Cir.), *cert. denied*, 434 U.S. 1071 (1977) 19
United States v. Bagley, 537 F.2d 162 (5th Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977) 19, 23
United States v. Barrett, 539 F.2d 244 (1st Cir. 1976) .. 19, 20
United States v. Benveniste, 564 F.2d 335 (9th Cir. 1977) 17
United States v. Brandenfels, 522 F.2d 1259 (9th Cir.), *cert. denied*, 423 U.S. 1033 (1975) 20
United States v. Guillette, 547 F.2d 743 (2d Cir. 1976), *cert. denied*, 434 U.S. 839 (1977) 20, 22
United States v. Harris, 403 U.S. 573, 91 S. Ct. 2075, 29 L.Ed.2d 723 (1971) 10
United States v. Hoyos, 573 F.2d 1111 (9th Cir.), *cert. denied*, 439 U.S. 840 (1978) 19

CASES

Page

United States v. James, 590 F.2d 575 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 917 (1979) 24
United States v. Katsougrakis, 715 F.2d 769 (2d Cir. 1983), *cert. denied*, 434 U.S. 1071 (1977) 19
United States v. Matlock, 415 U.S. 164, 94 S. Ct. 988, 39 L.Ed.2d 242 (1974) 10
United States v. Metz, 608 F.2d 147 (5th Cir. 1979), *cert. denied*, 449 U.S. 821 (1980) 18
United States v. Pena, 527 F.2d 1356 (5th Cir.), *cert. denied*, 426 U.S. 949 (1976) 20, 21
United States v. Satterfield, 572 F.2d 687 (9th Cir.), *cert. denied*, 439 U.S. 840 (1978) 19
United States v. Silverstein, 732 F.2d 1338 (7th Cir. 1984) 20
United States v. Thomas, 571 F.2d 285 (5th Cir. 1978) ... 18, 19

Page

OTHER AUTHORITIES

Declarations Against Penal Interest: Standards of Admissibility Under An Emerging Majority Rule, 55 B. U. L. Rev. 148 (1975) 24

Declarations Against Penal Interest: What Must Be Corroborated Under The Newly Enacted Federal Rule Of Evidence, Rule 804(b)(3), 9 Val. U. L. Rev. 421 (1975) 24

House Committee On The Judiciay, Report On The Federal Rules Of Evidence, H. R. Rep. No. 650, 93rd Cong. 1st Sess. (1973) at 16, *reprinted in* 1974 U.S. Cong. & Ad. News 7075 14

Letter from Senator John L. McClellan to Judge Albert B. Maris, Committee on Rules of Practice and Procedure (August 12, 1971), *reprinted in* 117 Cong. Rec. 33,642 (1971) 12, 15, 16

Preliminary Draft of the Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161 (1969) 10, 11, 23

Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 Stan. L. Rev. 271 (1974) 17

Senate Comm. on the Judiciary Report on the Federal Rules of Evidence, S. Rep. No. 1277, 93rd Cong., 2d Sess. (1974), at 24 15

Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong , 1st Sess., Report on H.R. 5463 (Comm. Print 1973), at 151 15

Supreme Court of the United States, *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183 (1973) 15

Tague, Perils of the Rulemaking Process: The Development, Application and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception, 69 Geo. L. J. 851 (1981) 11, 12, 13, 14, 21, 22, 23, 24

The Theoretical Foundation of the Hearsay Rules, 93 Harv. L. Rev. 1786 (1980) 24

7 Wigmore, Evidence § 2056 (Chadbourn rev. ed. 1974) .. 15

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FARIED BAIANI,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI

To The Honorable Supreme Court of the United States:

NOW COMES FARIED BAIANI, Petitioner, and files this Petition for Writ of Certiorari and would show as follows:

OPINIONS BELOW

1. The opinion of the Court of Appeals for the Fifth Circuit is unpublished and is reproduced in the appendix.

2. The ruling of the District Court for the Northern District of Texas on the issue presented in this petition is unpublished and is reproduced in the appendix.

STATEMENT OF JURISDICTION

1. The judgment of the Court of Appeals is dated October 21, 1986.

2. A timely Motion for Rehearing was overruled on December 4, 1986.[1]

3. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

1. The Fifth Amendment to the United States Constitution provides, in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

2. The Sixth Amendment to the United States Constitution provides, in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . ."

3. The Fourteenth Amendment to the United States Constitution provides, in part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . ."

4. Federal Rule of Evidence 804 provides, in part: "(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

---

1. The order overruling the Motion is dated November 4, but file stamped December 4. An extension was granted, and the Motion For Rehearing was not even filed until November 17. The November 4 date is a clerical error.

. . .

> (3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. . . ."

STATEMENT OF FACTS

On February 24, 1985, the Petitioner arrived at Dallas-Fort Worth International Airport aboard Thai Airways Flight 740. (R. III, 69). The Petitioner's luggage included a suitcase, a briefcase, a handbag, and a large brown burlap sack. (R. III, 84-85). Customs Inspector Robert Crawford inspected the Petitioner's luggage. (R. III, 85). He found spices and miscellaneous other items in the handbag. (*Id.*). The briefcase contained ordinary business documentation. (R. III, 86). The suitcase contained clothing and jewelry. (R. III, 87). The Petitioner had told Crawford that he was a carpet importer, so Crawford asked if the burlap bag contained carpet. (R. III, 81). The Petitioner responded that it contained rice and later allegedly explained that he was bringing it home for his mother. (*Id.*).[2]

At some point, an agricultural inspector arrived to inspect the rice. (R. III, 88). He made a small slit in

---

2. The Petitioner denied making this statement. (R. IX, 39).

the burlap bag, removed some rice, and retaped the bag. (R. III, 158-160). According to Crawford, the Petitioner appeared nervous. (R. III, 93). As a result, Crawford decided to x-ray the bag of rice. (*Id.*). As a result of the x-ray, four bags of heroin were found wrapped in a towel concealed in the rice. (R. III, 97).

A few minutes later agent Edward Van Patten of the Drug Enforcement Administration arrived on the scene. (R. III, 206). Agent Van Patten first asked the Petitioner where he had got the heroin, and the Petitioner shrugged his shoulders. (R. IV, 12). In response to further questioning, the Petitioner explained that he had met an Afghani individual at a restaurant in Delhi and had become friends with the man. (R. IV, 15, 93). The man had asked the Petitioner to carry the bag of rice into the United States. (*Id.*). The man's relatives were supposed to contact the Petitioner and pick up the bag of rice. (R. IV, 17). The man also gave the Petitioner $500.00. (R. IV, 95).

The four bags of heroin were submitted to a laboratory, and fingerprints were successfully lifted off the bags. (R. V, 182). The fingerprints could not be identified; they did not match the Petitioner's fingerprints. (*Id.*). An investigation of the Petitioner and of the names listed in the address book seized from the Petitioner revealed no prior convictions and no prior involvement with narcotics. (R. VII, 44-58). Nevertheless, Agent Van Patten made no effort to investigate the Petitioner's statement. (R. IV, 18; VIII, 249).

The Petitioner testified on his own behalf. He testified that he began working for his wife's uncle's oriental carpet company in June of 1984. (R. VIII, 162-163).

He made three trips to India to purchase carpet. The first trip was from June to December of 1984. (R. VIII, 163). The second trip was later in December, 1984. (R. VIII, 164). The Petitioner left on his third trip in the first week of February, 1985. (R. VIII, 172). He went first to Luxemburg where he met his uncle. (R. VIII, 173). He then went to Hamburg. (*Id.*). From Hamburg he went to Essen. (*Id.*). Finally, he went to New Delhi, arriving there on February 18. (R. VIII, 174). In New Delhi, he met with several friends and associates. (*Id.*). He met Najeeb and Jamala Asefi. (*Id.*). They were Afghanis who he had earlier met in Kashmir. (R. VIII, 175). This was in late September or early October of 1984. (R. VIII, 177). He saw them again briefly on his second trip in December. (R. VIII, 179). On his third trip, he arranged to have dinner with them in the hotel. (R. VIII, 181). During the course of the meal, another Afghani who identified himself as Usaf Jalal introduced himself. (R. VIII, 182).

Mr. Jalal came to visit the Petitioner again the next day. (R. VIII, 190). They talked about different subjects. (R. VIII, 192). At one point, the Petitioner told Mr. Jalal that all of his family had escaped from Afghanistan except his sister. (*Id.*). The Petitioner expressed concern that one of his sister's sons was nearing military age and would be forced to fight in the war. (R. VIII, 192). Mr. Jalal told the Petitioner that he could get a passport to help get the boy out of Afghanistan. The Petitioner was hesitant, but ultimately agreed to purchase a passport. (R. VIII, 194-195).

The Petitioner again saw Mr. Jalal a day or two later. (R. VIII, 201). Mr. Jalal gave the Petitioner a blank Republic of Afghanistan passport. (R. VIII, 203). At

about this point, the Asefis arrived at the Appellant's room. (R. VIII, 204). The Petitioner paid Mr. Jalal for the passport and asked Mr. Jalal if he could be of any service to him. (R. VIII, 205, 207). Mr. Jalal said that he did need a favor and asked the Petitioner to take a bag of rice to Mr. Jalal's mother. (R. VIII, 207). The Petitioner at first said he could not do this, but felt obligated. (R. VIII, 209). Mr. Jalal left the room and returned later with a large bag of rice. (R. VIII, 210). It was a type of Indian rice which is unavailable in the United States. (*Id.*). The Petitioner asked who he should send the rice to, but Mr. Jalal explained that his family was moving and that they would contact the Petitioner. (R. VIII, 212). The Petitioner gave Mr. Jalal his address. (R. VIII, 213). Mr. Jalal then gave the Petitioner $500.00 and told him to give any money that remained after paying the weight charges to whomever picks up the bag of rice. (R. VIII, 214). The Petitioner did not learn that the bag contained heroin until after he was arrested. (R. VIII, 252).

Najeeb Asefi testified that he first met the Petitioner in Kashmir twelve or thirteen months before trial. (R. VII, 69-70). Mr. Asefi saw the Petitioner in Delhi on February 19, 1985. (R. VII, 70-71). Mr. Asefi and his wife again saw the Petitioner the next day at his hotel. (R. VII, 74). There, Mr. Jalal overheard them speaking Dari (an Afghani language) and introduced himself. (R. VII, 75, 78). They had a general conversation, and the Petitioner gave Mr. Jalal his room number. (R. VII, 79). Mr. Asefi next saw the Petitioner in his room at the hotel two nights later. (R. VII, 97). Mr. Jalal was there. (*Id.*). The Petitioner had a passport; he gave Mr. Jalal almost $400.00 as Mr. Asefi arrived. (R. VII,

98-99). Mr. Jalal asked the Petitioner to take a bag of rice to Texas to Mr. Jalal's mother. (R. VII, 99). The Petitioner reluctantly agreed to do so. (R. VII, 100). Mr. Jalal did not tell the Petitioner what was in the sack; he did not mention any contraband. (*Id.*). Mr. Asefi's wife gave similar testimony. (R. VII, 132-149).

The Petitioner attempted to persuade the district court to admit the confession of Mr. Khan Sayed.[3] Mr. Sayed was arrested by Indian authorities on April 22, 1985. (R. VII, 2). Shortly after his arrest, Mr. Sayed confessed. (R. VII, 3). He stated that on February 20, 1985, he had gone to dinner at a hotel restaurant. (DX-2-J) (not admitted). There, he met three Afghanis who he came to know as Faried, Zarib, and his wife. (*Id.*). The next day Mr. Sayed visited Faried at the hotel. Mr. Sayed learned that Faried was from Texas, U.S.A. Faried said that he wanted a passport for his nephew, and Mr. Sayed said that he could arrange this. (*Id.*). The next day, Mr. Sayed again visited Faried and delivered the passport. (*Id.*). Faried paid him $400.00 for the passport. (*Id.*). Mr. Sayed learned that Faried would be returning to Texas, and asked him to deliver some rice to Mr. Sayed's relatives. (*Id.*). Faried agreed, and Mr. Sayed paid him $500.00 for the fare. (*Id.*). According to Mr. Sayed, "I did not tell Faried about this heroin concealed in the bag of rice." (*Id.*). At the conclusion of the statement the Indian authorities noted that "offense is proved and Khan Sayed is arrested." (*Id.*).

Sometime after giving his statement, Khan Sayed was released on bond by Indian authorities. (DX-2C). Defense counsel was informed that Mr. Sayed had fled and

---

3. Apparently, this was the true name of Usaf Jalal.

was no longer available. (R. IX, 79). The Petitioner's brother traveled to India and made an extensive effort to locate Mr. Sayed, but was unsuccessful. (R. VIII, 120, 126-127, 142). A teletype received by the government on December 13, 1985, from the United States embassy in New Delhi confirmed the fact of Mr. Sayed's arrest and genuineness of the confession. (R. VI, 158; VII, 2, 3, 16). The teletype further revealed that Mr. Sayed was scheduled for trial in India on January 13, 1986. (R. VII, 3). The Petitioner offered a certified copy of Mr. Sayed's confession into evidence, but the district court sustained the government's objections. (R. VIII, 64-74). An offer by the Petitioner to pay the expenses for counsel for the government to travel to India and attempt to interview Mr. Sayed was declined. (R. VII, 3, 8-9).

On appeal, the Fifth Circuit adhered to its rule that the "fact findings" of a trial court concerning the "trustworthiness" of a statement against interest offered to exculpate the accused will be upheld on appeal unless "clearly erroneous." In ruling that the district court's ruling was not clearly erroneous, the Court of Appeals focused on the evidence in the record tending to *inculpate* the defendant. Thus, the Court of Appeals noted that the defendant's "repeated trips through Customs following the same mode of operation were intrinsically suspicious." The practical effect of the ruling of the Court of Appeals is to permit the district court to make a preliminary ruling on the *guilt or innocence* of the defendant. If the district court believes the defendant is innocent, the exculpatory statement is adequately corroborated, and, therefore, admissible. If the district court believes that the defendant is guilty, then its fact finding (express or implied) that

the exculpatory statement lacked "trustworthiness" will never be "clearly erroneous," and the statement will be inadmissible. Needless to say, the rulings below have serious implications for the right to trial by jury. This is particularly true in a case like the present where the exculpatory statement is central to the defense.

REASONS WHY WRIT SHOULD BE GRANTED

Scope and Interpretation of Federal Rule of Evidence 804(b)(3)

This case presents an opportunity for this Court to construe the meaning of "corroborating circumstances [which] clearly indicate the trustworthiness of the statement" in Federal Rule of Evidence 804(b)(3), thus providing instruction and guidance for the lower federal courts. In the present case Petitioner was indicted for and convicted of importing and subsequently possessing an amount of heroin in excess of one kilogram. At his trial, Petitioner offered the out-of-court statement of a third party which would have strongly tended to exculpate Petitioner while simultaneously inculpating that same third party. The district court refused to allow the statement into evidence, concluding that the statement did not provide corroborating circumstances which clearly indicated its trustworthiness because the district court believed that the trustworthiness of the declarant himself was suspect. The out-of-court statement was an essential component of Petitioner's defensive theory. The Court of Appeals ruled that the district court's determination regarding trustworthiness was not "clearly erroneous" and, therefore, affirmed. This Court should rule that Federal Rule of Evidence 804(b)(3) does not mandate

the exclusion of such statements and that any uncertainty as to the veracity of the out-of-court declarant goes to the weight to be accorded the statement by the trier of fact and not to the statement's admissibility.

This Court has previously addressed neither the correct interpretation nor the constitutional validity of Federal Rule of Evidence 804(b)(3). In *United States v. Matlock*, 415 U.S. 164, 177, 94 S. Ct. 988, 39 L.Ed.2d 242 (1974), *Chambers v. Mississippi*, 410 U.S. 284, 299 n. 18, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973), and *United States v. Harris*, 403 U.S. 573, 584, 91 S. Ct. 2075, 29 L.Ed.2d 723 (1971) this Court did not implicitly approve Rule 804(b)(3) as enacted because that rule differs from the version of the rule pending at the time of each of these decisions. Petitioner submits that, in the absence of guidance from this Court, the Courts of Appeals have adopted ad hoc interpretations of the rule which are consistent neither with each other nor with the legislative intent underlying the rule. Additionally, some of the federal courts, including the District Court and the Court of Appeals for the Fifth Circuit, have adopted interpretations of the rule which undermine the constitutional protections afforded to the accused in a criminal proceeding.

As initially proposed by the Advisory Committte in the *Preliminary Draft*, rule 804(b)(3) (originally numbered 8-04(b)(4)) contained no requirement that statements offered to exculpate the accused be corroborated in any manner. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of the Proposed Rules of Evidence for the United States District Courts and Magistrates*, 46 F.R.D. 161, 378 (1969) (hereafter *Preliminary Draft*).

Indeed, the Advisory Committee rejected fears concerning the possibility of fabrication either of the fact of making the statement or in its contents. Advisory Committee Note to *Preliminary Draft, supra,* at 385. *SEE* TAGUE, *PERILS OF THE RULEMAKING PROCESS: THE DEVELOPMENT, APPLICATION AND UNCONSTITUTIONALITY OF RULE 804(b)(3)'S PENAL INTEREST EXCEPTION,* 69 Geo. L.J. 851, 868-69 (1981) (hereafter TAGUE). In responding to objections by the Department of Justice that there should be no hearsay exception for statements against the declarant's interest, Professor Cleary commented:

> [The problems of contrived or boastful statements are] aspects [that] were carefully considered by the Advisory Committee, particularly against the background of the Maryland decisions . . . , and the decision was reached that they were problems of weight and not appropriate grounds for exclusion. Similar considerations call for rejection of the Department's proposal that corroboration be required as a condition to admissibility.
>
> Preliminary Draft of the Proposed Federal Rules of Evidence, (Public's) Suggestions with Reporter's Comments, at 191 (on file at Judicial Conference), *quoted in* TAGUE, *supra,* at 870-71.

Thus the Advisory Committee clearly adopted the position that a "court should not condition the admission of a defense-offered statement on separate proof that the declarant had spoken and had spoken truthfully." TAGUE, *supra,* at 871.

The *Revised Draft,* rule 804(b)(3) (still numbered 804(b)(4) at that point) still provided for no corroboration. However, Senator John L. McClellan wrote to the

Chairman of the Committee on August 12, 1971, expressing concerns that the Proposed Federal Rules "would seriously impair the administration of justice in the United States," his primary objection focusing upon the penal interest exception to the hearsay rule. LETTER from SENATOR JOHN L. McCLELLAN to JUDGE ALBERT B. MARIS, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (August 12, 1971), *reprinted in* 117 CONG. REC. 33,642 (1971) (hereafter McClelland Letter). Fearing that legislation proposed by Senator McClellan could endanger Congressional action on the rules the Advisory Committee had been working on since 1965, the Committee members were willing to compromise on certain items to minimize potential opposition. *See* TAGUE, *supra,* at 873-99. Senator McClellan acknowledged that federal law should be changed to admit certain statements against the penal interest of the declarant, but expressed the view that the proposed rule went too far. McClellan Letter, *supra,* at 33,647. Statements made by Committee members clearly indicate that the Committee as a whole viewed the corroboration requirement as superfluous because such statement would inherently bear surrounding indicia of reliability in nearly all circumstances. The Committee apparently viewed the corroboration requirement as "a bargaining chip that lacked substantive merit." TAGUE, *supra,* at 876. Unfortunately, the Committee did not resolve how a defendant satisfied the corroboration requirement. *Id.*

Pursuant to ongoing discussions with Senator McClellan, and in the face of ongoing criticism from the Department of Justice, the Committee adopted a "simple corroboration" addition to the rule, and incorporated in the second paragraph to the NOTE to the *Revised Draft*:

> The requirement of corroboration is included as a safeguard against fabrication. Since the statement will be offered by an accused, the situation is not adopted to rulings in terms of the weight of the evidence. Cf. Rule 406(a). Also, it should be noted that corroboration *may consist* of testimony of innocence by the accused, thus presenting a situation quite different from the requirement that testimony of an accomplice or a confession be corroborated.
>
> Advisory Committee Amendments to Revised Draft, September 3-5, 1971, at 130 (presented to Standing Committee at its meeting of September 30-October 1, 1971) (unpublished).

Despite renewed objections by the Justice Department, the Standing Committee returned Rule 804(b)(4) to the Supreme Court without changing the simple corroboration language. The Supreme Court promulgated the *Supreme Court Draft* with Rule 804(b)(4) still unchanged on November 20, 1972. The Special Subcommittee on Reform of Federal Criminal Laws (later renamed the Subcommittee on Criminal Justice) of the House Committee on the Judiciary altered the second sentence of the rule, setting forth the present wording. Without explanation, the Subcommittee rejected "simple corroboration" and (arguably without understanding the import of its choice of phraseology) chose instead to require circumstances "clearly" corroborating the "trustworthiness" of the statement. TAGUE, *supra*, 888-92.

In detailing the development of the corroboration requirement one has considerable difficulty explaining how a court should interpret that requirement. Throughout the development of the requirement, the Advisory and Standing Committees made little effort to explain what was to be corroborated and by what quantum of evidence.

In its Note to the *Supreme Court Draft*, for example, the Standing Committee said only that the "simple corroboration" test should be construed in such a manner as to effectuate "its purpose of circumventing fabrication." Standing Committee Note to *Supreme Court Draft*, at 327. The vagueness of this explanation confirms both the Standing Committee's reluctance to add the requirement and its apparent hope that the requirement would be meaningless. TAGUE, *supra*, at 947-48, n. 482. Similarly, the House Subcommittee never discussed how courts should interpret its version of the corroboration requirement, except indirectly by concluding that the trial court in *Donnelly v. United States*, 228 U.S. 243, 33 S. Ct. 449, 57 L.Ed. 820 (1913), should have admitted the declarant's statement. HOUSE COMMITTEE ON THE JUDICIARY, REPORT ON THE FEDERAL RULES OF EVIDENCE, H. R. REP. NO. 650, 93RD CONG. 1ST SESS. (1973), at 16, *reprinted in* 1974 U.S. CONG. & AD. NEWS 7075, 7090 (result in *Donnelly*, in which circumstances "plainly indicated reliability," would be changed by rule 804(b)(3)). Thus, there is no clear interpretation as to the necessary requisites for the rule's corroboration requirement.

The language "clearly indicate" is not used elsewhere in the Federal Rules of Evidence. Moreover, the Subcommittee's position on *Donnelly* appears to be inconsistent with its apparent intent to increase the defendant's burden of proof. TAGUE, *supra*, at 948-49. *Donnelly* would provide an opponent of the penal interest exception with perhaps the best example of a case in which the trial court should *not* have admitted the statement. In *Donnelly*, there is no evidence to check the veracity of the witness who would have testified about the declarant's

purported statement and only questionable evidence to link the declarant with the crime. *Id.*, at 949.

Dean Wigmore's explanation for the corroboration requirement for accomplice testimony provides a highly instructive analogy. He argues that at early common law the "rule" was not a rule but an admonition to the judge to caution the jury about the credibility of the accomplice's testimony. 7 WIGMORE, EVIDENCE § 2056 (CHADBOURN rev. ed. 1974). Although Congress refused to enact Proposed Rule 105, SUPREME COURT OF THE UNITED STATES, *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 199 (1973) (summing up and comment by the judge), neither the House of Representatives nor the Senate thereby intended to forbid federal courts from continuing the federal common law practice of commenting on the weight of the evidence. SUBCOMM. ON CRIMINAL JUSTICE OF THE HOUSE COMM. ON THE JUDICIARY, 93RD CONG., 1ST SESS., REPORT ON H.R. 5463 (COMM. PRINT 1973), at 151 (refusal to adopt rule 105 does not affect existing common law); SENATE COMM. ON THE JUDICIARY REPORT ON THE FEDERAL RULES OF EVIDENCE, S. REP. NO. 1277, 93RD CONG., 2D SESS. (1974), at 24 (refusal to adopt rule 105 does not affect existing federal common law). Senator McClellan (who appeared well satisfied with the "simple corroboration" requirement) offered the following suggestion:

> [W]here the declarant himself had been involved in the past in criminal offenses, [the judge should instruct the jury that] his statement should be received and credited only with the utmost care because of the special danger of perjury and the virtually uni-

> versal experience of the untrustworthiness of such declarations.
>
> McClellan Letter, *supra*, at 33,648.

The precise wording of the Senator's suggestion (cautioning the jury to view defense evidence with skepticism) might give rise to serious constitutional questions. However, in other contexts, this Court has held that an instruction adequately protects the defendant from untrustworthy evidence offered by the Government. *See, e.g., Parker v. Randolph*, 442 U.S. 62, 73-74, 99 S. Ct. 2132, 60 L.Ed.2d 713 (1979) (plurality opinion) (instruction that codefendant's confession be considered only against source avoids confrontation clause violation); *Manson v. Braithwaite*, 432 U.S. 98, 116, 97 S. Ct. 2243, 53 L.Ed.2d 140 (1977) (juries intelligently measure weight of identification evidence despite untrustworthy aspects); *Cool v. United States*, 409 U.S. 100, 103-04, 93 S. Ct. 354, 34 L.Ed.2d 335 (1972) (per curiam) (discussion of use of accomplice's testimony); *Opper v. United States*, 348 U.S. 84, 95, 75 S. Ct. 158, 99 L.Ed. 101 (1954) (severance not required despite admission of codefendant's incriminating statements).

This Court has held that the government need satisfy only a preponderance of the evidence standard to overcome the criminal defendant's objection that he confessed involuntarily. *Lego v. Twomey*, 404 U.S. 477, 487, 92 S. Ct. 619, 30 L.Ed.2d 618 (1972). One could argue that, regardless of the government's burden of proof, the defendant's burden should be lower than a preponderance of the evidence. If, to warrant acquittal, the defendant must "prove" only that a reasonable doubt exists or, conversely, must "disprove" only that the government has

failed to meet its "beyond a reasonable doubt" burden, a court should allow the defendant to introduce evidence to establish either variation as long as the defendant satisfied an equally low test of reliability. *Lego v. Twomey, supra,* suggests such an argument will not prevail. If the defendant is protected sufficiently by the "beyond a reasonable doubt" standard so that the government need satisfy only a lower evidentiary admissibility standard, it might follow that that guilt standard is also sufficiently protective to oblige the defendant to satisfy the "preponderance of the evidence" standard. Irrespective of one's reading of *Lego, supra,* the current application of corroboration requirement of the penal interest exception clearly imposes on the defendant a burden higher than that of a "preponderance of the evidence." In the present case, for example, the district court refused to admit the statement despite *three* witnesses who corroborated portions of the statement. *Cf.* SALTZBURG, *STANDARDS OF PROOF AND PRELIMINARY QUESTIONS OF FACT,* 27 STAN. L. REV. 271, 301-02 (1974) (standard no higher than "reasonable possibility" should be imposed on defendant); TAGUE, *supra,* at 953-58 (court analogies of corroboration requirement in penal interest exception to coconspirator statements and/or voluntariness of defendant's confession erroneous for reasons cited).

To illustrate the difficulty which the Courts of Appeal have encountered in utilizing the corroboration requirement of Rule 804(b)(3) some specific examples are useful. In *United States v. Benveniste,* 564 F.2d 335 (9th Cir. 1977), the court examined the strength of the *government's* evidence in deciding whether to admit a penal interest exception. *Id.* at 341. The government's own investigation revealed facts which provided corroboration for the statements in issue, and the appellate court

concluded that it was reversible error to exclude those statements. *Id.* at 341-42. In contrast, the Court of Appeals for the Fifth Circuit has examined evidence adduced by both sides in determining whether the statement in issue was adequately corroborated. *United States v. Thomas*, 571 F.2d 285, 290 (5th Cir. 1978). In essence, the *Thomas* court concluded that the corroboration requirement was satisfied because the government's case did not cast doubt on the statement in issue, and its exclusion was thus reversible error. *Id.* However, on a later occasion, the Fifth Circuit decided that although the government's evidence corroborated some aspects of the statement sought to be admitted, there was not sufficient corroboration to satisfy the requirements of Rule 804(b)(3). *United States v. Metz*, 608 F.2d 147, 157 (5th Cir. 1979), *cert. denied*, 449 U.S. 821 (1980). The court then proceeded to indicate that "having failed to meet the corroboration standards of one hearsay exception, the statement must also fail the equivalent trustworthiness standards of Fed. R. Evid. 804(b)(5)," indicating apparently that all hearsay exceptions utilize precisely the same indicia of reliability. *Id.* Thus it would appear that in some instances the defendant must present evidence to clearly indicate the trustworthiness of the statement he seeks to have admitted, while in others a defendant need only point to weaknesses in the government's case against him to accomplish the same result on appeal.

As discussed above, the House Subcommittee never explained why it was dissatisfied with a "simple corroboration" test nor, more importantly, what it meant by the phrase "clearly indicate." In the absence of a congressional explanation, courts may examine related doctrines to provide a "general guide" for the definition of a given

word or phrase. *Leary v. United States*, 395 U.S. 6, 46 n. 93, 89 S. Ct. 1532, 23 L.Ed.2d 57 (1969) (to define word "knowing" in criminal statute, court examined definition of "knowledge" in Model Penal Code). The lower federal courts have struggled with the corroboration test. *See United States v. Barrett*, 539 F.2d 244, 253 (1st Cir. 1976) (rule demands circumstances solidly indicating trustworthiness that go beyond minimal corroboration but does not impose a standard so strict as to be utterly unrealistic); *United States v. Hoyos*, 573 F.2d 1111, 1115 (9th Cir. 1978) (same result, quoting *Barrett*); *United States v. Satterfield*, 572 F.2d 687, 693 (9th Cir.), *cert. denied*, 439 U.S. 840 (1978) (corroborating circumstances must do more than tend to indicate the trustworthiness of the statement; they must *clearly* indicate it) (emphasis in original); *United States v. Thomas*, 571 F.2d 285, 290 (5th Cir. 1978) (declarant's statement exculpating defendant "given credibility" by same circumstances statement "has additional credibility because the possibility of fabrication, which is the rationale of the corroboration requirement, is slight"); *United States v. Bagley*, 537 F.2d 162, 167 (5th Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977) (corroborating circumstances must show both that the statement was made by the declarant and they must afford "a basis for believing the truth of the matter asserted"); *United States v. Katsougrakis*, 715 F.2d 769, 777 (2d Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984) (attending circumstances must confirm trustworthiness of statement, specifically rejecting Fifth Circuit approach as to credibility of the in-court witness); *United States v. Atkins*, 558 F.2d 133, 135 (3rd Cir.), *cert. denied*, 434 U.S. 1071 (1977) (record must reveal substantial corroborating circum-

stances which indicate the trustworthiness of the declarant's statement); *United States v. Silverstein*, 732 F.2d 1338, 1347 (7th Cir. 1984) (circumstances solidly indicating trustworthiness, quoting *Barrett*); *Lowery v. Maryland*, 401 F. Supp. 604, 607 (D. Md. 1975), *aff'd without opinion*, 532 F.2d 750 (4th Cir.), *cert. denied*, 429 U.S. 919 (1976) ("except to indicate that simple corroboration is not enough, no clues are given as to what constitutes corroborating circumstances").

Because of the lack of congressional guidance, numerous courts have turned to this Court's opinion in *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973), for guidance as to the quantum of corroboration necessitated by Rule 804(b)(3). *See United States v. Guillette*, 547 F.2d 743, 754-55 (2d Cir. 1976), *cert. denied*, 434 U.S. 839 (1977) (relying on *Chambers* reasoning to assess trustworthiness of third-party confession); *United States v. Pena*, 527 F.2d 1356, 1362 (5th Cir.), *cert. denied*, 426 U.S. 949 (1976) (same); *United States v. Brandenfels*, 522 F.2d 1259, 1264 (9th Cir.), *cert. denied*, 423 U.S. 1033 (1975) (distinguishing facts from those in *Chambers*); *Lowery v. Maryland, supra*, (citing *Chambers* for proposition that spontaneity of confession is indicium of reliability). This Court asserted that the confessions at issue in *Chambers* "bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception (to the hearsay rule) for declarations against interest." *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973). However, the *Chambers* opinion has limitations as a guide in interpreting Rule 804(b)(3).

When this Court announced its opinion in *Chambers*, the *Supreme Court Draft* version of Rule 804(b)(3) with its "simple corroboration" requirement was pending before Congress. The House Subcommitte increased the rule's corroboration requirement after this Court's decision in *Chambers* without explaining the relationship, if any, between the two. *See* TAGUE, *supra*, at 965 n. 588. One could conclude that the corroborating circumstances in *Chambers* actually constituted the minimum corroboration necessary to satisfy Rule 804(b)(3), in which case the rule's corroboration test is constitutionally suspect.

Second, using *Chambers* as a guide has lead several courts to erroneously demand that the corroborating evidence match the facts in *Chambers*. *See United States v. Pena*, 527 F.2d 1356, 1361 (5th Cir.), *cert. denied*, 426 U.S. 949 (1976) (witness' statement inadmissible because statement not confession and witness not present in court). *See also* cases cited in TAGUE, *supra*, at 966 n. 589. This Court intended that lower courts interpret *Chambers* narrowly, but did so because the decision was reached on constitutional rather than on evidentiary grounds. *Chambers*, 410 U.S. at 302-03 ("Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial.") This Court did neither weight the various factors listed in *Chambers* nor indicated whether any lesser quantum of corroborating circumstances would have required the trial court to admit a penal interest statement on constitutional grounds. TAGUE, *supra*, at 966. By focusing too narrowly on the

factual circumstances in *Chambers,* a court might too easily err by requiring equivalent circumstances. *Id.*

This Court in *Chambers* stressed that McDonald, the declarant in question, was available in court and could have been called to contest the testimony regarding his "confessions" to the crime. *Chambers,* 410 U.S. at 301. Rule 804(b)(3) specifically requires that the declarant be unavailable. A court might erroneously conclude that if the declarant is unavailable, Rule 804(b)(3) requires *more* corroboration than was present in *Chambers. See, e.g., United States v. Guillette,* 547 F.2d 743, 754 (2d Cir. 1976), *cert. denied,* 434 U.S. 839 (1977) (declarant's unavailability important factor in *Chambers* analysis); TAGUE, *supra,* at 967.

The potential for error in applying too stringent a test for corroboration is greatest in cases such as *Chambers,* and the instant case, in which a single individual is accused of wrong-doing (one-person crime) and the statement offered by the defense would literally substitute the declarant for the defendant. As in *Chambers,* Petitioner has "asserted his innocence throughout" and the erroneously excluded statement of Khan Sayed would have strongly corroborated that assertion of factual innocence. *Chambers,* 410 U.S. at 287.

As the Michigan Supreme Court recognized, "the circumstances surrounding the making of a third-party statement, whether 'assuring reliability,' 'indicating trustworthiness,' or 'rendering totally incredible,' go to the weight to be given the testimony, not its admissibility." *People v. Edwards,* 396 Mich. 551, 565, 242 N.W.2d 739, 745 (1976). To allow excess discretion in the trial judge's initial decision as to admissibility is to risk casting the

judge as finder of fact and completely negating the traditional role of the jury. The trial judge should make findings of fact as to the credibility of the declarant and as to the credibility and probative value of his statement. However, in the absence of such findings an appellate court may stretch to find a reason to justify exclusion of a statement. *See United States v. Bagley*, 537 F.2d 162, 166 (5th Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977) (trial court *could have found* statement unreliable because proof insufficient that declarant made statement) (emphasis supplied).

Indeed, both the *Preliminary* and *Revised Drafts* of the rule provided that the jury would decide the trustworthiness issue. The Note to the rule in those drafts explained that "questions of possible fabrication are better trusted to the competence of juries than made the subject of attempted treatment by rule." Advisory Committee Note to *Revised Draft, supra*, at 444; Advisory Committee Note to *Preliminary Draft, supra*, at 386. Moreover, none of the traditional reasons advanced to explain why the judge must determine the admissibility of certain sorts of evidence justify transferring the jury's role to the judge. Commentators have long argued that judges and not juries should resolve preliminary fact questions where the evidence presents highly technical evidentiary questions, presents information that jury might be unable to evaluate fairly, or presents issues that implicate a privilege. *See* TAGUE, *supra*, at 972. None of these concerns arise in the penal interest exception, except perhaps the issue of "fair" evaluation of the evidence. This could easily be dealt with through cautionary instructions from the trial judge and/or a challenge by the prosecution of the worth and reliability of the declarant's statement

by cross-examining the reporting witness, investigating the declarant, or delivering a scorching summation deriding both the reporting witness and the declarant. TAGUE, *supra*, at 972-73.

Additionally, the rule's corroboration requirement burdens the defendant but not the government. In analogous situations, the government need not establish the credibility of other sorts of questionable evidence, such as a defendant's confession, a coconspirator's implication of the defendant, or an eyewitness' identification, as a condition of admissibility. *See, e.g., United States v. James*, 590 F.2d 575, 582-83 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 917 (1979) (Government may introduce coconspirator's statement subject to later motion either to strike or to declare mistrial). *See also* TAGUE, *supra*, at 973 n. 631.

As currently interpreted, Rule 804(b)(3) has generated considerable adverse reaction from the commentators. NOTE, *THE THEORETICAL FOUNDATION OF THE HEARSAY RULES*, 93 HARV. L. REV. 1786 (1980); TAGUE, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 GEO. L. J. 851 (1981); NOTE, *Declarations Against Penal Interest: What Must be Corroborated Under the Newly Enacted Federal Rule of Evidence, Rule 804(b)(3)*, 9 VAL. U. L. REV. 421 (1975); NOTE, *Declarations Against Penal Interest: Standards of Admissibility Under an Emerging Majority Rule*, 55 B. U. L. REV. 148 (1975). This comment strongly suggests that statements such as those at issue in Petitioner's case should be admitted into evidence and accorded whatever weight the jury might wish to give them.

Petitioner's case presents the strongest possible argument for the admission of the declarant's statement, accompanied by appropriate instructions to the jury if necessary. The declarant, Khan Sayed, made a statement which, if believed by the trier of fact, would literally substitute Mr. Sayed for Petitioner in the role of the guilty party in this "one-person crime." In addition to his own tesitmony, Petitioner presented the District Court with the testimony of two individuals, Mr. Najeeb Asefi and his wife, which corroborated numerous elements of the declarant's statement and of Petitioner's version of the entire transaction in Delhi. That Mr. Sayed had both the motive and the opportunity to place the contraband within the bag of rice is obvious. Petitioner made two attempts to locate Mr. Sayed and obtain his presence at Petitioner's trial, both of which proved unsuccessful. Nevertheless, the district court ruled, largely on the basis of other evidence in the record tending to show the guilt of the defendant, that the statement lacked "trustworthiness," and the statement was never admitted before the jury. The Court of Appeals affirmed this ruling as not "clearly erroneous." Obviously, determining the trustworthiness of the statement was tantamount to determining the guilt or innocence of the defendant. The statement should have been submitted to the jury, and the jury should have been permitted to give the statement whatever weight it chose.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner Baiani prays that this case be reversed and remanded for a new trial.

Respectfully submitted,

HAYNES & FULLENWEIDER
A Professional Legal Corporation

By: _____

CLINARD J. HANBY
State Bar #08880500

4300 Scotland
P. O. Box 701068
Houston, Texas 77270-1068
(713) 868-1111

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Petition for Writ of Certiorari were served on The United States Solicitor General, Department of Justice, Washington, D.C. 20530, _____, U.S. Attorney, 515 Rusk, 12th Floor, Houston, Texas 77002 by _____ on this ____ day of _____, 1987.

_____

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-1081

Summary Calendar

(D.C. Docket No. CR-4-85-32-E)

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

FARIED BAIANI,
Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas

(October 21, 1986)

Before GEE, JOLLY, and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:*

This appeal from criminal convictions presents two points for reversal and a somewhat unusual fact situation.

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Defendant Baiani was convicted by a jury of importing over eight pounds of heroin and of possessing it with intent to distribute. He was apprehended with the heroin, which was concealed in a bag of rice, when he disembarked on February 24, 1985, at the Dallas/Fort Worth International Airport (DFW) from a flight which had originated in Bangkok. His defense was that he was unaware that the rice bag contained contraband, that he was simply carrying it into the United States as a favor to a casual acquaintance who gave it to him in New Delhi for delivery to his mother in Texas.

At trial there was evidence that on two earlier but recent occasions Baiani had entered the United States from India carrying or bearing agricultural produce: a bale of cotton on December 5, 1984, and a bag of rice on the last day of that same month. The defendant tendered in evidence a purported translation from the Hindi of a confession by one Khan Sayyad to having been the person who passed off the drug-laden bag of rice to the hapless defendant. This was excluded by the trial court on grounds to be noted, and Baiani appeals that action to us as well as the admission in evidence of the bag of rice, which he claims should have been excluded on fourth amendment grounds. We affirm.

Neither contention need detain us long. As for the exclusion of the supposed Sayyad confession, the trial court correctly noted that such statements "tending to expose the declarant to criminal liability and offered to exculpate the accused [are] not admissible unless [among other things] corroborating circumstances clearly indicate the trustworthiness of the statement." Rule 804(b)(3) of the Federal Rules of Evidence so states, and from

first to last we have applied it strictly as written. *United States v. Briscoe*, 742 F.2d 842, 846 (1984) and cases cited; *United States v. Bagley*, 537 F.2d 162 (5th Cir. 1976) (McCree, J.). Determinations of the trial court regarding the trustworthiness of such statements will be upheld unless clearly erroneous. *United States v. Briscoe, supra* at 846-7 and cases cited. This determination is not: as the trial judge noted, Baiani's repeated trips through Customs following the same mode of operation were intrinsically suspicious. Sayyad was not the name of the person whom defendant Baiani testified gave him the rice bag; that person was supposedly named Usaf Jalal. Baiani's brother was present in India at the time of the supposed confession, the policeman who took the supposed confession has never been heard from, and the supposed "Sayyad," after confessing to the heroin offense, jumped bail and has vanished. These and other circumstances present in the record fully support the trial court's finding.

As for the claim of an unreasonable search of the rice bag, conducted without probable cause, it's plain that on the facts of this case, the Dallas/Fort Worth International Airport was the functional equivalent of the border. To be sure, the aircraft landed first in Seattle on its way from Bangkok; but Baiani's luggage (including the rice bag) was checked through from overseas to DFW, and neither he nor it deplaned in the United States before they entered the United States Customs area at DFW.

For these reasons, Baiani's convictions are AFFIRMED.

APPENDIX B

RULING OF THE UNITED STATES DISTRICT COURT

THE COURT: Let's take a few minutes' break.

(Trial recesses, 10:10 a.m.)

(Trial resumes, 10:40 a.m.)

THE COURT: The Court has heard the evidence. The Court has heard the argument of counsel concerning the offer of admission of Defendant's Exhibits 2A through 2K inclusive. For the record, the defense has advised the Court that there are only—that they are only offering 2B through 2J for Court purposes only and that Exhibit 2A is the only one they are offering at this time for all purposes and to go to the jury. It may become as I recall, 2K, which is the application to get the court papers, that could change. I mean, they might want to offer that for all purposes. So that's the way the Court is looking at these exhibits.

The Court has heard the evidence. The Court has heard the arguments. The Court has read the cases, and to begin with, I'm going to state that the Court is admitting all 2A through 2K for Court purposes only. The Court is denying the admission of 2A for the jury or for all purposes. In connection with this ruling, the Court makes the following comments and following findings in conjunction with the Court's ruling in denying the admission of Exhibits 2A through 2K as the record stands at this point.

First, with regard to hearsay, of course, naturally included within hearsay is not excluded under the hearsay

rule if even the part of the combined statements conform with an exception to the hearsay rule. The letter in which —well, it's 2A here, which is the alleged confession and which is joint Exhibit 1 or the Court's Exhibit 1, contains what this Court would refer to as triple hearsay. The letter itself is hearsay, or the alleged confession. The police report is hearsay. Sayed's confession is hearsay. So each statement must independently qualify under an exception to the hearsay rule. Of course, there has been no offer by the defendant of the police report. There has been no attempt to offer the police report into the record. And, of course, if it had been, Federal Rules of Evidence 803(a) specifically excludes from that exception matters referred by police officers and other law enforcement personnel in criminal cases. The only possible way that it could come in is as a business record, but in order to comply with the requirements under a business record, there are some seven or eight requirements that have to be established. There has been no effort to establish the police report as a business record. As I said, the business record hasn't even been—I mean, the police report hasn't even been tendered or offered for the jury purposes, and assuming that the defendant could get by most of the requirements are producing the report. There is nothing to authenticate the policeman's report. There is no affidavit—not even an affidavit from the policeman who wrote up the report. The defendant must get by the second element, that Sayed had a duty to report the information. Defendant can only get by this if he can show that the statement was a declaration against interest, and as I raised the question earlier, I'm not sure this is a declaration against interest under the state of the facts that are before the Court at this time.

Now, the defendant has indicated that they are relying a great deal on the Chambers case, which is Chambers versus Mississippi, 410 U.S. 284 which is a 1973 case. The Court finds that the facts in this case are clearly distinguishable from the facts in the Chambers case. In the Chambers case, it involved a confession by a third party tending to exculpate the defendant on trial, and the supreme court reversed the trial court in that case holding that given the corroborating circumstances that the declarant contests that three different persons to include this confession was deprived of a fair trial. In that case there were three separate individuals all of whom were present and testified in the case. The Court had the opportunity to pass upon the credibility of those witnesses. In this case that's not true. The alleged exculpatory statement is made to an alleged policeman or some law enforcement officer in India, the circumstances of which this Court knows nothing about except that Sayed, who made the statement, had been arrested some two months after the incident the basis of the trial before this Court on a charge of hashish, the possession of hashish. The Court has no way of knowing what was said at the time he made such—the statement that's contained in Defendant's Exhibit 2A, whether there was any promises or any statements made whatsoever by the police. Further, Chambers says that this type of matters must be taken on a case by case basis.

Also, for the record, the Chambers case was before the Federal Rules of Evidence were promulgated that were not now operating. The language in 803(b) requiring corroborating circumstances takes care of this concern and to take the defendant's argument to an ex-

treme would require the Court to admit most any hearsay statement in a criminal case if we follow the contentions that are being contended for by the defendant. And Congress explained its concern over exculpatory statements and why it shows the language it did in writing or comprising 803(b)—because here the history shows and Congress said in passing this rule, that quote, "Statements tending to exculpate the accused are more suspect and should have their admissibility conditioned upon some further provision ensuring trustworthiness," end quote.

And that's what Congress stated, and the Fifth Circuit has applied this in the case of United States versus Bagley, B-a-g-l-e-y, which is 537 Federal Reporters Second. The case begins on Page 162 but more particularly on Page 166 and 167, which touches this case expressly. This case is very much in point with the case that's before this Court.

In that case, the Fifth Circuit, cert was denied in 429 U.S. 1075 discussed this very provision. The Court held that such a determination is a question of law and in making its findings of fact to keep out the confession, the Court recognized the need for a more stringent test in these circumstances to guard against the danger of fabrication. The Court said that the trial court is given wide latitude in determining whether the corroborating circumstances clearly indicate the trustworthiness of the statement. This is so, naturally, because the trial judge has the opportunity to judge the credibility of the witnesses and to exercise the discretion that he's satisfied that the statement is trustworthy. Under the state of facts before this Court at this time, this Court's just not willing to—is not satisfied that the alleged

statement or confession meets the requirement of trustworthiness as the law requires.

The Court finds, I mean from the record in this case, and it's very clear, that this case occurred. The defendant was arrested on February the 24th, 1985, when he was coming through customs in New York with the bag of rice in his possession in which the heroin was later located to be containing in that bag of rice. What I meant to say was that less than two months before—and the Court finds that this defendant came through the New York port of entry, likewise, with a container of rice which—and I want to make it clear. This case, the defendant came through DFW airport on February 24, 1985. On December 31, 1981, the Court finds by the evidence that's before the Court, that the defendant at that time came through the New York Airport with—the amount of rice is not known, but at least there was a container of rice of some kind. This certainly would go to show that this defendant—he was not unaccustomed to carrying rice. This wasn't the first time from this incident that occurred in India. The two occasions within which such a short period of time raise suspect in connection with this man. Then the time of the confession by Sayed certainly has bearing on the Court. It shows that this was some two months in the area of two months after the defendant Sayed had been arrested. This Court cannot—from a trustworthiness standpoint, why would Sayed confess to another crime when being arrested by a completely and different offense than the one that this defendant is charged with in this Court? Of course, the evidence shows that Sayed knew at the time he was arrested in April of '85 that Baiani had already been arrested and had been caught coming

through customs. What is there to show this Court that this wasn't planned on the part of Sayed? The evidence clearly shows that the defendant's brother was in India at the very time in question when Sayed was arrested. The newspaper article that's referred to—the witness before the Court this morning said that he first learned of Sayed's arrest, I believe, from his brother. There is no question as the record stands that defendant's brother certainly could have talked with Sayed and fully advised of all of the matters that the defendant was in here in the United States, what—I know this is speculation, but I mean that goes to the trustworthiness of the statement that's involved.

You have got the occurrences at the hotel in New Delhi when Sayed came there. And, incidentally, the Court finds that this defendant—I mean that this alleged confession came from an individual who is using different names. There have been two different names. He has been introduced and referred to—the witnesses before this Court say that he introduced himself as Jalal or whatever that name is, and the court reporter has it, and then it turns out that the man it's filed on in India and made the alleged confession is a man that's named Sayed. I believe it's S-a-y-e-d. Certainly, this person is going under different names. He's not here to testify. There is no way that the jury can pass on the credibility of Sayed. There is no way they can judge his demeanor or his actions or his conduct as he has testified and determine whether or not—what credibility, if any, they should give to a witness under this circumstance. Also, the Court finds that, and with the evidence before the Court, that the defendant and Sayed or Jalal as he was known at the time, there was some discussion of getting a passport for

a nephew or relative of the defendant; that the defendant was paying this man some four hundred dollars for the passport. The circumstances of that passport are certainly not fully developed, but at least before the Court at this point there is a strong implication that this was not a legitimate passport. That it was—when you're buying a passport, paying four hundred dollars for a passport from an individual you had only met—allegedly according to the facts neither knew before this transaction took place.

Also, the report says that defendant Sayed—I forgot what it says. At least it said he used heroin, a sack or something of this kind and that he had dealt in heroin and that he was a user of heroin. All of this goes to the type of individual that this alleged confession is coming from, a user of narcotics, a dealer in narcotics, a person who is charged with selling hashish. And I want the record to fully show that there is no evidence before this Court that Sayed has been charged in any way with this four kilos of heroin that's the subject of the case before this Court. The only thing that Sayed is charged with is the hashish, and that incident occurred some two months after the incident in question. All of these things go to the credibility of that witness or the confessor, the one who has said, "I did this," and the Court still—what's he got to lose under the facts of this case.

There is just no way that the Court can lend credibility to this particular confession in view of the facts before the Court. There are just too many unanswered questions. There is just no way of knowing that this is not a setup between the—by Sayed or by certain family members of the defendant in this matter. And this is in no way questioning the integrity of the two witnesses that testified here, that have been brought here, Mr. and Mrs.—

MR. COGDELL: Asefi.

THE COURT: —Asefi, because their testimony does not corroborate anything about heroin. It does corroborate that there is no discussion by defendant and Sayed or Jalal about heroin. They say there was no discussion, but certainly they are not going to discuss heroin before these witnesses if there is some type of contended law violation or conspiracy going on between the defendant and Jalal and Sayed. They are not going to discuss that in the presence of these two witnesses that came here. They only corroborate that there was a sack of rice brought in and that there was—that he was paid five hundred dollars to take the rice from India to the United States.

Again, I want to make that the Chambers analysis must be done on a case by case basis. That's what the supreme court said. The record that's before this Court, including the documents regarding Sayed, leaves open too many questions to permit this Court to find that the confession has adequate assurance of truthfulness—of trustworthiness, I should say.

Again, there is no corroborating testimony to the fact that Baiani knew nothing of the heroin. There is just none. The testimony of the two Afghans only goes to the fact that Baiani was going to take the rice back and he was going to be paid five hundred dollars. There is no way Baiani and Sayed would discuss bringing this heroin into the United States in front of these witnesses unless they were a part of the matter, and there is no indication of that except there are some letters that uses general or abstract terms, but giving it the full benefit of what the witness says, that in no way corroborates that Baiani didn't know something about the heroin being in the sack

of rice. The Court finds that there is just no corroborating circumstances to clearly indicate the trustworthiness of the confession getting in on a declaration against interest.

The Court finds under 803(24) that there is no circumstantial guarantee of trustworthiness in this case as to exhibit—Defendant's Exhibit 2A. To admit this report into evidence with all of the unanswered questions that remain regarding its trustworthiness would in this Court's opinion fly in the face of the general purpose of the Federal Rules of Evidence and not be in the best interest of justice. This would not be in the best interest of justice under the facts of this case to permit this exhibit to be introduced. This determination is based on all of the evidence, both before the Court and the jury. All the evidence that this Court has heard, that's the basis on which this Court is making this determination, and the Court—this determination is based on all such evidence that has been put forth up to this point to the Court and the Court's credibility, determination of the witnesses as well as the law of the supreme court and of this circuit.

Therefore, this Court in keeping with the case that the Court's already referred to, and that's the Bagley case, the requirement that the corroborating circumstances clearly indicate the trustworthiness of the statement, is just not present. There is no clearly indicating evidence of trustworthiness as to this document that is requested to be admitted as Exhibit Number 2A and through the record.

Also the Court in arriving at this decision is relying on another Fifth Circuit case which is styled, United States versus Albert John Pena, P-e-n-a, which is found at 527 F.2d, Page 1356, but more particularly over on

Pages 1362—61, 62, and 63, particularly on Page 1362 which involves this particular issue that's now before the Court.

So based upon the statements by the Court and the findings of the Court, the Court again reiterates that there is no evidence that establishes in the mind of this Court that the circumstances surrounding this document clearly indicate trustworthiness of the document, and, therefore, it should be and it is hereby denied to be admitted into this case as the record stands.

MR. COGDELL: One housekeeping matter on that if I might, Your Honor. We have provided the Court—obviously, we're going to ask the Court include those exhibits. For the

* * *

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 86-1081

Summary Calendar

D.C. Docket No. CR-4-85-32-E

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FARIED AHMED BAIANI,
Defendant-Appellant.

(Filed December 18, 1986)

Appeal from the United States District Court for the
Northern District of Texas

Before GEE, JOLLY, and HIGGINBOTHAM,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

October 21, 1986

ISSUED AS MANDATE: December 15, 1986

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 86-1081

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FARIED AHMED BAIANI,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Texas

(Filed December 4, 1986)

ON PETITION FOR REHEARING

(November 4, 1986)

Before GEE, JOLLY and HIGGINBOTHAM,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

By: /s/ THOMAS GIBBS GEE
United States Circuit Judge